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In the Supreme Court of the United States

OCTOBER TERM, 1951

NO. 818

ELLIS ARNALL, DIRECTOR OF PRICE STABILIZATION,
PETITIONER

v.

SAFEWAY STORES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE EMERGENCY COURT OF APPEALS

The Solicitor General, on behalf of Ellis Arnall, Director of Price Stabilization, respectfully prays that a writ of certiorari issue to review the judgment entered in the above-titled case on May 5, 1952, by the United States Emergency Court of Appeals.

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 123-127) is not yet reported.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on May 5, 1952 (R. 128). The jurisdiction of this Court is invoked under Section 408(d) of the Defense Production Act of 1950 (64 Stat. 808, 50 U.S.C. App., Supp. IV, 2108(d)).

QUESTION PRESENTED

Whether the court below properly held that retailers and wholesalers of materials were within the coverage of Section 402(d)(4) of the Defense Production Act of 1950, the so-called Capehart Amendment, despite the fact, admitted by the court below, that the legislative history indicated a contrary Congressional intent.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the so-called Capehart (Section 402(d)(4)), Fugate (Section 402(d)(3)) and Herlong Amendments (Section 402(k)), added to the Defense Production Act of 1950 (Act of September 8, 1950, 64 Stat. 798, 50 U.S.C. App., Supp. IV, 2061) by the Defense Production Act Amendments of 1951 (Act of July 31, 1951, 65 Stat. 131), are set out in the Appendix, *infra*, pp. 25-27.

STATEMENT

Respondent Safeway Stores, Incorporated, owns and operates approximately 2000 retail food stores in twenty-three states and in the District of Columbia. Since May 14, 1951, respondent's sales of commodities at retail have been subject to Ceiling Price Regulation 15 (CPR 15), fixing ceiling prices for most dry and certain perishable grocery products sold in retail stores doing an annual business of more than $375,000 and in all chain stores regardless of the amount of their annual business (R. 47-111; 16 Fed. Reg. 2735).[1] Following the

[1] CPR 15 was issued on March 28, 1951, effective April 5, 1951, by the Director of Price Stabilization pursuant to the

normal pricing practices of the industry, CPR 15, together with CPR 16 covering other food retailers and CPR 14 covering wholesalers of food, provided a method of fixing ceiling prices based on specific percentage markups over cost of merchandise. These markups varied among the different categories of food (such as baby foods, cereals) and the different seller groups.[2]

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authority vested in him by the Defense Production Act of 1950, Executive Order 10161 (15 Fed. Reg. 6105), and Economic Stabilization Agency General Order No. 2 (16 Fed. Reg. 738). The pricing provisions of this regulation were made mandatory as of April 30, 1951, which date was later extended to May 14, 1951 (16 Fed. Reg. 3650).

[2] Generally, the markups used followed those established by the Office of Price Administration under the Emergency Price Control Act of 1942, during the years 1943 to 1946, with some upward adjustment in many instances to reflect changes since World War II. Recognizing that in some categories "markups have changed substantially since the war," the OPS Director indicated in the accompanying Statement of Considerations that he was "organizing a study of margin and earning figures for food distributors in order to obtain more recent comprehensive data. If the study should indicate that the ceiling prices established under this regulation are either too low or too high, the regulation will be promptly revised to reflect the results of the survey." (R. 49). However, the OPS Director stated in conclusion (R. 58):

> In formulating these regulations the Director of Price Stabilization has consulted extensively with industry representatives and has given full consideration to their recommendations. In his judgment the provisions of these regulations are generally fair and equitable and are necessary to effectuate the purposes of Title IV of the Defense Production Act of 1950.

See *Safeway Stores, Incorporated* v. *Arnall*, 195 F. 2d 319 (E.C.A.), certiorari denied, No. 706, this Term, June 2, 1952.

After the enactment of the Capehart and Herlong Amendments in July 1951, (*infra*, pp. 25-27),[2] respondent filed on August 24, 1951, with the Office of Price Stabilization (OPS) an application in which it requested the adjustment of the ceiling prices of its stores located in the Seattle, Washington area pursuant to the Capehart Amendment, or in the alternative, an amendment of CPR 15 by the issuance of a Supplemental Regulation which would "fulfill the intent of Congress as expressed in Section 402(k)" (the Herlong Amendment) (R. 9-18). Thereafter, between August 24, 1951, and October 1, 1951, respondent filed 27 additional such applications covering about one half of its stores (R. 4-5). By these applications, respondent sought to have the ceiling prices on each of the grocery items there enumerated (*e.g.*, each consumer unit of Cream of Wheat) determined by (1) the highest price per unit received during the period from January 1, 1950, to June 24, 1950, adjusted to reflect (2) the increased (or decreased) merchandise cost for each unit thereafter until July 25, 1951, and (3) the net operating cost ad-

[2] The Capehart Amendment requires, among other things, that the ceiling prices of "any person subject to a ceiling price" be adjusted to reflect his highest pre-Korea price for each "material" sold, and the increases or decreases in all direct or indirect costs allocable thereto which occurred prior to July 26, 1951.

The Herlong Amendment prohibits the fixing of ceiling prices generally for "sellers of materials at retail or wholesale" which would deny them their customary percentage margins over costs of materials during the 30 day period preceding the invasion of Korea (June 24, 1950).

justment in cents or fractions thereof to compensate for other cost increases (R. 11, 16).

By letter dated October 2, 1951, the Director of Price Stabilization informed respondent that 25 of these applications had been denied. He pointed out that the Capehart Amendment did not apply to sellers of materials at retail and that OPS "does not plan to issue regulations to provide for adjustments of retail prices on the basis you have suggested" (R. 22). The letter further pointed out that the Herlong Amendment by its very terms operated only prospectively and consequently does not require that "CPR 15 be revised to assure retailers their customary pre-Korean percentage margins" (R. 23). Considering the applications as also addressed to his discretionary responsibility to establish generally fair and equitable price ceilings, the Director refused to take the action requested, in part because "changing CPR 15 from an average markup basis to an individual historical markup basis would substantially impair our efforts to control prices" (R. 23).[4] By a subsequent letter dated October 16, 1951, the Director informed respondent that its remaining 3 applications had been denied for the same reasons (R. 25-27).

Respondent, on October 29, 1951, protested against CPR 15 and the Director's denials of its

[4] Acting on the basis of an industry-wide earnings survey, OPS has, by Amendment No. 14 to CPR 15, effective June 2, 1952, increased percentage markups in a substantial number of grocery categories. 17 Fed. Reg. 4932.

28 applications for adjustment and amendment (R. 1-8). On November 29, 1951, the Director reaffirmed his denial of the applications for adjustment on the ground that the Capehart Amendment was inapplicable to retailers of commodities (R. 30).[5] On December 21, 1951, respondent sought review of these actions of the Director and filed its complaint with the Emergency Court of Appeals pursuant to Section 408(a) of the Defense Production Act of 1950, 50 U.S.C. App. Supp. IV, 2108(a) (R. 113-118).

The Emergency Court of Appeals reversed the action of the Director. Relying on the general references in the Capehart Amendment to "any material (other than an agricultural commodity)" and "any person subject to a ceiling price" (see *infra*, p. 25), the court held that it was "perfectly clear and unambiguous" that wholesalers and retailers are covered by the Amendment (R. 125). Although it admitted that "it may fairly be said that a preponderance of the debate" shows that the Capehart Amendment was not intended to apply to retailers and wholesalers (R. 126), the court refused to accord any weight to this legislative history, saying (R. 126):

> * * * The primary evidence of the legislative intent is the language of the statute, however. It is that language which states the rule by

[5] At the same time, the Director dismissed the portion of the protest directed against his denial of the petitions to amend CPR 15 with the comment that no such procedure is provided either in the Act or in the procedural regulation (R. 31).

> which those who read it must govern their conduct. If that language is ambiguous or unreasonable or absurd in its effect, they are, by virtue of that very fact, put on notice to look further for its construction. But if the language is clear and unambiguous and its effect is not unreasonable, futile or absurd they are entitled to rely upon it and need not search the legislative records for a limitation which the members may have had in mind but which they did not express in their enactment. In that case there is no need for construction and no ambiguity to be resolved by a resort to legislative history. That is the situation here.

Accordingly, the court entered a judgment setting aside the Director's denials of respondent's applications for adjustments and remanding the cause for consideration of the applications on their merits (R. 127, 128).

REASONS FOR GRANTING THE WRIT

The holding of the court below that the Capehart Amendment extends to retailers and wholesalers of merchandise is based on the doubly erroneous assumptions that the Amendment's language unambiguously covers retailers and wholesalers and that the court was therefore precluded from giving effect to the clear legislative history to the contrary. By this ruling, the court has thwarted the Congressional design in an area of great significance to the continuing effort to control inflation. In particular, the ruling has created unnecessary conflicts with the Herlong Amendment, the sole amendment intended to deal

with such wholesalers and retailers, and has reached the unreasonable and discriminatory result of placing this group in a favored position not enjoyed by any other segment of the national economy.

The Office of Price Stabilization has advised that if this construction of the Capehart Amendment is permitted to stand, increased price ceilings, costing the consuming public and the Government billions of dollars, will probably be required. For, under this construction, wholesalers and retailers are entitled to price adjustments to reflect pre-July 26, 1951, increases in *all* costs, direct or indirect, for each item sold and not just the customary pre-Korean percentage markup on merchandise costs. Moreover, price ceilings under the Capehart Amendment are to be tailored to costs allocable to each item of merchandise sold, and OPS will be confronted with the nearly impossible administrative task of making millions of individual ceiling price adjustments.[6] In view of the error of the court below and the widespread impact of this decision upon the national economy, as well as upon the administration of the anti-inflation program embodied in the Defense Pro-

[6] For example, there are about 500,000 retail grocery stores in the country and each stocks between 1500 and 3000 items. Under the ruling below, it would be necessary to recompute price ceilings on many of these items in accordance with the cost picture of each item in each store. Calculation of such individually tailored price ceilings for wholesalers and other retailers obviously increases the enormity of the administrative task involved.

duction Act of 1950, review by this Court is plainly warranted.

1. Contrary to the view of the court below, this Court has not enunciated any rule, consistently adhered to, which forbids reference to legislative history where the statutory language appears to be clear. The decisions in which this Court has looked to legislative history as a guide to statutory construction are legion. They involve all kinds of cases and types of statutes. See, *e.g.*, *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 472; *Ozawa* v. *United States*, 260 U.S. 178, 194; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333; *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-4; *United States* v. *Dickerson*, 310 U.S. 555, 562; *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479; *Walling* v. *Portland Terminal Co.*, 330 U.S. 148; *Cabell* v. *Markham*, 148 F.2d 737, 739 (C.A. 2) and cases there cited, affirmed, 326 U.S. 404, 409; *Chicago & Southern Air Lines, Inc.* v. *Waterman SS Corp.*, 333 U.S. 103, 106; *Schwegmann Bros.* v. *Calvert Distilling Corp.*, 341 U.S. 384, 390-395, 399; *Johansen* v. *United States*, Nos. 401, 414, decided May 26, 1952, slip opinion p. 4; see also cases cited in *Commissioner* v. *Estate of Church*, 335 U.S. 632, 687-9 (Appendix to opinion of Frankfurter, J., dissenting).

Such resort to legislative history is proper even where the statutory language appears to be clear, for the ultimate objective in construing a statute is to effectuate the policy of Congress, and since

"words are inexact tools at best. * * * there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination' *United States* v. *American Trucking Assns.* [*supra*]. See also *United States* v. *Dickerson,* [*supra*]". *Harrison* v. *Northern Trust Co., supra,* at p. 479.[7]

Accordingly, since "[t]he meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction" (*United States* v. *Dickerson, supra,* at 562; see, also, *United States* v. *Fisher,* 2 Cranch 358, 386), it was error for the court below to "make a fortress out of the dictionary." (*Cabell* v. *Markham, supra,* at 739). Instead, it should have heeded the admonition of Mr. Justice Holmes that "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before" (*Johnson* v. *United States,* 163 Fed. 30, 32 (C.A. 1)), and given effect to the manifest intent of Congress as revealed in the legislative history outlined *infra,* pp. 16-23.

2. In refusing to accord any weight to legislative history, the court erred for the further reason that the face of the Capehart Amendment does not,

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[7] In the recent cases cited in the opinion below (R. 126, fn. 5) (*Packard Motor Car Co.* v. *Labor Board,* 330 U.S. 485, 492; *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260; *Ex parte Collett,* 337 U.S. 55, 61), the Court appears to be saying no more than that the plain wording of a statute should not be overridden by ambiguous legislative history.

contrary to the court's holding, clearly extend to wholesalers and retailers, especially when it is read together with other provisions of the Defense Production Act, particularly the cognate Herlong Amendment (*infra,* pp. 26-27). Indeed, when so read, the most reasonable construction that can be given the terms of the Capehart Amendment, it seems to us, is that it does not apply to these distributing wholesalers and retailers.

Unlike the Capehart proviso which the court below held to apply to distributors by virtue of general language, the Herlong Amendment, which was enacted at the same time, is applicable by its express terms to sellers at wholesale and retail.[8] It was passed at the behest of these distributors, who complained that in the course of allowing increases in manufacturers' prices for automobiles and rugs, OPS had allowed the distributors, not their customary percentage markup on these increases, but only increments equal to the dollar-and-cent increases in the manufacturers' prices, thereby substantially reducing the distributors' historical percentage margins.[9] This type of cost absorption, it was claimed, not only reduced the

[8] That the Herlong Amendment dealt with wholesalers and retailers in specific terms strongly suggests, standing by itself, that the general language of the Capehart Amendment is inapplicable to such distributors. *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208; *MacEvoy Co.* v. *United States,* 322 U.S. 102, 107.

[9] See, for example, Hearings of House Banking and Currency Committee on H.R. 3871, 82d Cong., 1st Sess., pp. 1186-87, 1321.

"historic discount" but also disrupted "prevailing customs and practices,"[10] since the normal price technique of distributors is to add a certain customary percentage markup to the invoice cost of the merchandise sold, with the markup taking care, in general, of all other costs. In response to this complaint of the distributors, the Herlong Amendment was passed, prohibiting OPS from thereafter issuing any rule, regulation, order or amendment which "shall deny to sellers of materials at retail or wholesale their customary percentage margins over costs of the materials" during the 30-day period preceeding the Korean outbreak. As stated in the Conference Report (H. Rep. No. 770, 82d Cong., 1st Sess., p. 25), it was expected that the Herlong Amendment would

> permit the President to comply with its provisions by maintaining customary percentage margins for groups of sellers, or groups of commodities, rather than for each seller of each material. This would facilitate administration of regulations prescribing uniform dollars and cents ceilings or percentage margins for groups of sellers or groups of commodities.

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[10] See Hearings before House Banking and Currency Committee on H.R. 3871, 82d Cong., 1st Sess., pp. 1186-7 (statement of Alton M. Costley of the National Automobile Dealers Association). See also, *id.* at pp. 1254-7 (statement of Rowland Jones, Jr., President of the American Retail Federation); Hearings before Senate Banking and Currency Committee on S. 1397, 82d Cong., 1st Sess., pp. 2214-5 (statement of G. L. Ward, representing the National Retail Dry Goods Association and the Limited Price Variety Stores Association).

Construing the Capehart Amendment to include the same distributors of merchandise covered by the Herlong Amendment creates unnecessary conflicts. For example, under the former, all actual costs in dollar-and-cents, rather than a percentage markup on merchandise costs, are to be used as the basis of fixing prices. But application of this pricing technique to distributors is the very thing which the Herlong Amendment was designed to avoid. As we have just indicated, that provision, in express terms, requires the fixing of ceiling prices on the basis of the customary percentage markup on cost of merchandise, and it was anticipated that the customary-percentage-markup would take the place of a calculation of increases in actual individual costs. In this connection, it was urged in support of the Herlong Amendment that the freeze of percentage margins there contemplated would exert "tight control" since, as explained by Rowland Jones, Jr., President of the American Retail Federation, in proposing the amendment, "it precludes the distributive trades * * * from increasing margins to cover increased costs or increased taxes * * *."[11] Applying the Capehart Amendment with its direction to consider all actual costs to these distributive trades, would, of course, vitiate any possibility of such "tight control."

Again, the adjustments provided by the Capehart Amendment result in separate price ceilings

[11] See Hearings before House Banking and Currency Committee on H.R. 3871, pp. 1255, 1256.

for each seller and for each of his commodities; price ceilings are to reflect the cost incurred by each individual seller for each commodity and costs vary from seller to seller and from commodity to commodity. The Herlong Amendment, however, contemplated that uniform ceiling prices or ceiling prices based on uniform markups for groups of commodities and groups of sellers would be used, and that the use of such ceiling prices would facilitate administration, *supra*, p. 12. Accordingly, to apply the Capehart Amendment's individual adjustment provision to wholesalers and retailers would not only preclude the proper application of the Herlong proviso itself but would also, contrary to the latter's aim, render administration of wholesale and retail ceilings much more difficult, if not impossible. See fn. 6, *supra*, p. 8.

Furthermore, this reading of the Capehart Amendment gives to wholesalers and retailers the benefits of both provisions, although all other sellers covered by the Capehart provision are entitled to its benefits alone. The inappropriateness of this result is brought into even sharper focus when it is recalled that simultaneously with its enactment of the Herlong and Capehart Amendments, Congress passed a third provision, the so-called Fugate Amendment (*infra*, p. 26), which bestowed special protection upon the producers of agricultural commodities. By virtue of its express language, the Capehart Amendment unquestionably does not apply to sellers covered by the Fugate Amendment, which, like the Herlong addition,

was tailored to meet the needs and practices of the segment of the economy there dealt with. Thus, under the holding below, of all groups of sellers in the economy only wholesalers and retailers are entitled to the dual benefits of two special provisions. [12]

The improbability of such a construction, taken together with the conflicts between the cognate Herlong and Capehart Amendments under the reading adopted below, certainly indicates that it would be more reasonable to construe the Capehart proviso as not applying to wholesalers and retailers. In any case, these considerations, at the very least, justify reference to the Amend-

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[12] Illustrative of the unreasonable result flowing from holding distributors entitled to the benefit of both Amendments is the fact that OPS is thereby disabled from requiring these sellers to pass on to consumers the benefits of roll-backs in the ceiling prices of manufacturers. Thus, when OPS rolls back a manufacturer's prices to reflect no more than his pre-July 26, 1951, costs, as it is authorized to do by the Capehart Amendment, the ceiling prices to be charged by wholesalers and retailers of these products could be lowered proportionately if they were covered by the Herlong Amendment alone. For that provision demands only a customary percentage markup on current costs. However, no reduction in these ceilings to reflect such lowered current costs would be possible if the wholesalers and retailers are also covered by the Capehart Amendment, for that provision automatically entitles those covered by it to all their costs as they were before July 26, 1951—regardless of current cost—and, of course, the manufacturers' price to the distributors during that period was the latters' actual cost at that time. In those circumstances, the result of the roll-back would be solely to give the distributors a windfall, and the roll-back's purpose of reducing prices to the consuming public would be wholly frustrated.

ment's legislative history, even within the restricted rule of statutory interpretation formulated by the court below (R. 126).

3. (a). Once it is recognized that there is no bar to using the legislative history of the Capehart Amendment as an aid to its construction, it becomes plain that that Amendment should be construed so as not to apply to wholesalers and retailers. For not merely "a preponderance of the debate" (R. 126), but the whole contemporaneous legislative history, consistently reveals the absence of any intent that it apply to wholesalers and retailers of merchandise.

At the outset, it should be noted that these distributors never asked for coverage under the Capehart Amendment, but on the contrary, their spokesmen uniformly sought the very different type of protection which was embodied in the Herlong proviso. See *supra*, pp. 11-12 and fns. 9-11. In contrast, the Capehart Amendment, like the Herlong and Fugate Amendments, was originated and developed to deal with the special problems of a particular segment of the economy, *i.e.*, manufacturers, processors and sellers of services, and was tailored to their special pricing techniques.[13] Under the regulations, which were then scheduled to become presently effective,[14] and which applied

[13] Unlike distributors, who customarily fix prices on the basis of a markup over material costs, manufacturers generally determine prices by allocating overhead expense to specific items.

[14] See CPR 22 (16 Fed. Reg. 3562), a general manufacturers' regulation which was issued April 25, 1951, to be effec-

to manufacturers and processors but not to distributors, sellers were required to recompute their ceilings by adjusting their pre-Korea prices for increases (or decreases) in material costs up to December 31, 1950 and labor costs up to March 15, 1951; no adjustments were allowed, however, for increased overhead expenses. To meet the complaints of the manfacturers against the substantial roll back of manufacturers' ceilings thus contemplated,[15] Congress passed the Capehart Amendment, under which these manufacturers' regulations were permitted to become effective[16] but

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tive May 28, 1951, and covered many durables such as furniture, household appliances, hardware and hand tools, many processed foods, chemicals, rubber products and many other manufactured goods. See, also, CPR 30 (16 Fed. Reg. 4108), issued May 4, 1951, also to be effective May 28, 1951, governing ceiling prices of many automotive and truck parts, aircraft parts, machinery of all kinds, farm equipment, fabricated structural steel shapes and bars and similar products. Companion regulations were CPR 37, 16 Fed. Reg. 4644 (cotton textiles); CPR 41, 16 Fed. Reg. 5044 (shoes); CPR 45, 16 Fed. Reg. 5753 (apparel); and CPR 18 Revised, 16 Fed. Reg. 4327 (wool yarn and fabrics).

At the request of many manufacturers and processors, the mandatory effective date of these regulations was postponed until July 2, 1951. See *e.g.*, 16 Fed. Reg. 5010, 5014.

[15] Specifically, the manufacturers complained that (1) it was unfair to require rollbacks at all; (2) it was unfair not to permit reflection in the new ceilings of increased overhead, as distinct from labor and material costs; and (3) the cutoff dates beyond which increased material and labor costs would not be recognized were unfair. See Hearings before Senate Banking and Currency Committee on S. 1397, 82nd Cong., 1st Sess., pp. 2295-7; 2309.

[16] By H.J.Res. 278, 82nd Cong., 1st Sess. (P. Law 69, 65 Stat. 110), temporarily extending the life of the Defense Pro-

each seller could obtain individual price adjustments to reflect all his pre-July 26, 1951, increased costs. See S. Rep. No. 796, 82nd Cong., 1st Sess., p. 3; see also S. Rep. No. 470, 82nd Cong., 1st Sess., pp. 16, 31; 97 Cong. Rec. 9152-3. That the purpose of the Capehart Amendment was to take care of the peculiar problems of the manufacturers and not of distributors, and that it was specifically related to the manufacturers' regulations issued by OPS (see *supra*, fn. 14, pp. 16-17),[17] strongly suggest that distributors are not within its ambit.

Any doubts as to the validity of this conclusion are removed by the statements of those responsible for the Amendment, confirming that it was not intended to cover these distributors. The remarks of Congressman Spence, who was Chairman both of the House Committee on Banking and Currency and of the committee which drafted the Conference Report, are typical. In connection with the Conference Report, he stated:

> It is also provided that the seller may take the period during 6 months previous to the Korean war, the highest price period during that time, and add to that all of the increases in his *manufacturing* costs, direct and indirect, all of the administrative expenses of every

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duction Act from June 30, 1951, to July 31, 1951, Congress prohibited OPS from making these regulations effective during the period of this extension.

[17] In this connection, it is also significant that the statutory procedure for the establishment of new ceilings contained in the third sentence of the Capehart Amendment follows the

> kind, character, or description—which, I suppose, means not only the office expenses but the advertising expenses and maybe lobbying expenses—and that will be his price. [Italics supplied (97 Cong. Rec. 9150).]

And, subsequently, he agreed with Representative Bolling when the latter directly asked:

> Is that correct—that this Herlong section governs the wholesalers and retailers of materials, while section 104(e) [the Capehart Amendment] governs manufacturers, processors, and sellers of services? [97 Cong. Rec. 9151).] [18]

Senator Maybank, Chairman of the Senate Committee on Banking and Currency, and Senator Capehart, whose name the Amendment bears, manifested the same understanding. During the debate on the Conference Report, Senator Maybank stated:

> It was our idea that some gougers and dishonest firms have taken advantage of the

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pattern set by OPS in General Overriding Regulation 10 (16 Fed. Reg. 4455), which was a hardship regulation applicable only to manufacturers and processors. See Hearings before Senate Banking and Currency Committee on S. 1928, S. 2092 and S. 2104, 82nd Cong., 1st Sess., p. 3265.

[18] Contrary to respondent's contention below, the statement of Representative Wolcott (97 Cong. Rec. 9151), made shortly after this exchange, that he disagreed with Representative Spence does not detract from the force of Mr. Spence's remark. Representative Wolcott's disagreement with Representative Spence did not relate to the quoted exchange, but rather to another matter on which Mr. Bolling had queried Mr. Spence at the same time (*i.e.* cost increases or decreases occurring after July 26, 1951). The court's misunderstanding of this statement and of Senator Capehart's comment discussed in fn. 20, infra, p. 21, apparently is the basis for its

> situation since Korea and their prices should be rolled back. On the other hand, we did not wish to leave it wide open to the rolling back of 75,000 or 80,000 honest businesses,[19] which, through no fault of their own, were required to pay an increased cost of materials, increased cost of labor, and increased transportation, the costs of which have increased excessively in many cases [in connection with freight rates, and so forth [97 Cong. Rec. 9027].

Thereafter, when Senator Benton queried (97 Cong. Rec. 9028):

> Does not the roll-back amendment have the effect of allowing the *manufacturer* the addition of his costs, but there is no allowance given to the *manufacturer* for his customary profit margin on those additional costs? [Italics supplied.]

Senator Capehart replied *(ibid)*:

> What the amendment does is to permit a seller to add whatever increase in costs he may have had, cost of materials, indirect and direct labor, factory, advertising, production costs, distribution, transportation, and administrative costs except such as the President may de-

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remark that there were statements in the legislative history which are contrary to petitioner's position (R. 126).

[19] Senator Maybank's reference to "75,000 or 80,000 honest businesses" plainly indicates that his statement was directed solely to manufacturers. The Senate Banking and Currency Committee, of which he is Chairman, had been advised that there were "over 75,000 manufacturers" in the country. See S. Rep. 470, 82d Cong., 1st Sess., p. 31.

> termine to be unreasonable or excessive. If the seller's price should be higher than is warranted after adding those increased costs, OPS rolls the price back. If the present price is less than it would be after adding these increased costs, then the *manufacturer* must be permitted to advance the price to take care of the increased costs. [Italics supplied.]

And in response to a question from Senator Moody (*id.* at 9028):

> I should like to ask the chairman further to clarify this point: Whether the bill as it now stands provides that the historic mark-up in the case of a *manufacturer* is a dollar mark-up, but the mark-up in the case of a wholesaler or retailer is now on a percentage basis under the bill? Is that correct? [Italics supplied.]

Senator Maybank commented *(ibid)*:

> That is my interpretation of the conference report.[20]

(b). This uniform contemporaneous legislative history, only a portion of which is set out above, is strongly buttressed by subsequent statements made shortly after the enactment of the Capehart Amendment in connection with a proposal to re-

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[20] Senator Capehart's apparent disagreement with Senator Maybank, upon which respondent relied below, seems to stem from the fact, as an examination of his statement in context reveals (97 Cong. Rec. 9029), that the Senator's attention had been distracted and for the moment he had lost the thread of the debate. That Senator Capehart did not in fact disagree with Senator Maybank is obvious from his subsequent explicit statements. See *infra*, p. 22.

peal or modify it. These statements have peculiar relevance here since they were made in the same session of Congress by the very members who had been responsible for the formulation of the Amendment.

During the Senate hearings on the later bill, the problem of the Amendment's scope was discussed. Senator Capehart unequivocally stated that the Capehart Amendment "does not apply to retailers and wholesalers," and that the Amendment, "as written, only applies to manufacturers and processors, because retailers and wholesalers were supposedly covered under the Herlong Amendment." [21] Senator Robertson, also a member of the Banking and Currency Committee and one of the conferees on the prior bill (97 Cong. Rec. 8632), likewise stated that "the Capehart amendment, properly construed, relates only to manufacturers and processors," and further that "it was not the intention of * * * the conferees to make that amendment apply to wholesalers and retailers * * *. Wholesalers and retailers are taken care of by the Herlong amendment." [22]

Similarly, the reports of the Banking and Currency Committees of both the House and Senate indicated an understanding that wholesalers and retailers were not covered by the Capehart provision. The report of the Senate Committee states

[21] Hearings before the Senate Banking and Currency Committee on S. 1928, S. 2092, and S. 2104, 82d Cong., 1st Sess., pp. 3219, 3256.

[22] *Id.*, at pp. 3219-20.

that the Amendment "was not intended to cover wholesalers and retailers since they are already provided for in [the Herlong Amendment]" (S. Rep. 796, 82d Cong., 1st Sess., p. 5), and the House Committee commented "[the Capehart Amendment] developed as a manufacturers' provision. Its pricing formulas are not applicable to all types of sellers. Wholesalers and retailers are covered in [the Herlong Amendment]" (H. Rep. 1186, 82d Cong., 1st Sess., pp. 4-5).[23]

In view of this consistent reading of the Capehart Amendment by the responsible Committees and members of Congress, there can be little question that the Capehart Amendment was not intended to apply to wholesalers and retailers of merchandise.[24]

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[23] The fact that this proposed amendment failed to pass does not indicate that the Capehart Amendment should be given the interpretation adopted below. The proposal to amend the Capehart proviso expressly to exclude wholesalers and retailers was, as indicated in the text, for the purpose of making the language more clearly reflect the consistent Congressional intent rather than of changing the scope of the Amendment. In addition, the opposition to the modifications was based not on any disagreement with the proposed clarification as to wholesalers and retailers but rather on the effects of various other portions of the proposed amendment on other aspects of the economy. See, *e.g.*, S. Rep. 796, 82d Cong., 1st Sess., pp. 9-18 (minority views).

[24] In its report on the bill to extend the Defense Production Act beyond June 30, 1952, the Senate Committee on Banking and Currency proposed an amendment "to make statutory and reemphasize the original congressional intent that this paragraph, commonly referred to as the Capehart amendment, is not applicable to retailers and wholesalers of materials, since these sellers are covered by section 402(k) [*i.e.*, the Herlong

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General

JUNE, 1952

Amendment]". Sen. Rep. No. 1599, 82d Cong., 2d Sess., p. 23.

APPENDIX

The pertinent provisions of the so-called Capehart (Section 402(d)(4)), Fugate (Section 402 (d)(3), and Herlong Amendments (Section 402 (k)), added to the Defense Production Act of 1950 (Act of September 8, 1950, 64 Stat. 798, 50 U.S.C. App. Supp. IV 2061) by the Defense Production Act Amendments of 1951 (Act of July 31, 1951, 65 Stat. 131), are as follows:

1. The Capehart Amendment provides:

> After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring subsequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling price, the President shall adjust such

ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term "costs" includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive.

2. The Fugate Amendment provides:

No ceiling shall be established or maintained for any agricultural commodity below 90 percentum of the price received (by grade) by producers on May 19, 1951, as determined by the Secretary of Agriculture.

3. The Herlong Amendment provides:

No rule, regulation, order or amendment thereto shall hereafter be issued under this title, which shall deny to sellers of materials at retail or wholesale their customary percentage margins over costs of the materials during the period May 24, 1950, to June 24, 1950, or on such other nearest representative date determined under section 402(c), as shown by their records during such period, except as to any one specific item of a line of material sold by such sellers which is in short supply as evidenced by specific government action to encourage production of the item in question. No such exception shall reduce such customary margins of sellers at retail or wholesale beyond the amount found by the President, in writing, to be generally equitable and proportionate in relation to the general reduc-

tions in the customary margins of all other classes of persons concerned in the production and distribution of the excepted item of material.

* * * * *

For purposes of this section a person is a "seller of a material at retail or wholesale" to the extent that such person purchases and resells an item of material without substantially altering its form; or to the extent that such person sells to ultimate consumers except (1) to government and institutional consumers and (2) to consumers who purchase for consumption in the course of trade or business.